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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 456

PETER J. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petition in this case proceeds upon the theory that the findings of fact made by the District Court were all wrong; also that the conclusions of law made by the District Court and the facts and conclusions in the opinion of the Circuit Court of Appeals were wrong.

Yet the petition contains no reference whatever to any evidence in the record, either inconsistent with or contradictory of any finding of fact or conclusion of law.

The first finding of fact made by the District Court recites that

"upon the underlying facts in this cause there is really no conflicting evidence."

The findings of fact made by the District Court, appearing in the transcript of record pages 185 to 190, presents a complete answer to all the contentions made in the petition for certiorari filed in this case.

In brief, petitioner in this case is seeking to re-argue to this Court matters of fact which have been adjudicated against him in the trial court and affirmed by the Circuit Court of Appeals. Although the determinations of fact against him were amply supported by the evidence, he is, in effect, asking this Court to review or to re-try the facts. Why he thinks that the Court should depart from its established rule not to put itself in the position of a trier of facts where there is any evidence to support the results reached in the trial court, is not explained. Yet that seems to be the sole object of this attempted appeal; for under the facts as found against him and under the well-established principles of law applicable thereto, the decision of the District Court and the affirmance by the Circuit Court of Appeals are fully sustained by the record.

It is, perhaps, the acme of understatement to say that the petitioner is reckless in his assertions of fact! To read the petition one would get the impression that respondent had abused petitioner by deliberately and wilfully destroying great quantities of valuable casinghead gas which could have been utilized or marketed in some mysterious but undisclosed way. Yet no evidence is pointed out and no place in the record is cited to support these wild claims!

When the record and the evidence are examined it is found that respondent conducted its operations with all diligence, prudence and care, doing what was necessary

and proper to operate its oil and gas leases efficiently, so that the products therefrom which could be saved and utilized would produce the greatest possible return for all interested parties—the petitioner and other royalty owners as well as the lessee. Instead of employing dilatory practices, it appears (and the trial court so found) that the respondent moved with all speed and at great expense to itself to construct a gasoline plant for the utilization of the casinghead gas, and that at the earliest possible time the gas was processed and petitioner was fully paid all sums due him as royalties thereon. What then, becomes of petitioner's claim that respondent failed to account to him for royalties on such gas?

It is, of course, uneconomical and unfeasible to construct large casinghead gasoline plants, at enormous expense, before the gas is known to be available, and no oil company could long continue in business if it engaged in such foolhardy practices. But the evidence in this case shows, and the trial court found, that respondent moved with all diligence and dispatch to build its plant and to utilize the gas, once its presence was proven.

As an example of petitioner's disposition to "make the wish father to the thought" in his extravagant claims of facts, we call attention to the first full paragraph on page 4 of the petition, contained under the heading which petitioner is pleased to designate "Salient Facts". In this one paragraph petitioner makes several assertions which are wholly unjustified. In the first place he states that respondent "refused" to prepare the product for market "on the alleged ground that it would be uneconomic to build a processing plant large enough to process it." In opposition to this the evidence shows that the respondent not only did not "refuse" to build such

a plant, but actually did build it and did utilize the casing-head gas at the earliest possible time!

Again, in the same paragraph petitioner, in speaking of the gas which could not be marketed or utilized prior to the construction of the plant, says: "No reason was given for not putting it back into the formation". Yet the record shows and the trial court so found that perfectly sound and convincing reasons existed for not putting the gas back into the formation, and that to do so would have brought financial loss to petitioner and respondent alike (see pages 163-164 of Transcript, and particularly the portion hereinafter quoted).

After all, what petitioner is here attempting to do is to have this Court set aside the findings of fact made below, even though such findings are uncontradicted in their entirety and are amply supported by the evidence, and to make new findings to support petitioner's somewhat fantastic theories! This it is neither the disposition nor the province of this Court to do.

On appeal, petitioner in the Circuit Court of Appeals, in his points relied on for reversal (Tr. pp. 193-194), made no complaint of any of the findings of fact made and entered by the District Court. The only claim made by petitioner concerning the evidence in the case, in the points relied on for reversal in the Circuit Court of Appeals, was the one numbered 10, which alleged error in the refusal of the District Court to admit as competent evidence certain computations made by the attorney for the plaintiff (attorney for the petitioner here).

Those computations appear in the transcript of the record, pages 129 to 147, inclusive. That was a document prepared by petitioner's attorney, based on a pur-

ported formula for computing the flow of gas in a pipe line; but the trouble with the computation was that it assumed a false premise as the foundation for the computation. In any event, it was nothing more or less than the argument of counsel, and the District Court very properly held that it was not competent evidence. However, the Court permitted it to be marked for identification and filed with the Clerk as a part of the argument.

An examination of the document reveals the erroneous basis on which petitioner's counsel had made his calculations by using pressures in the oil and gas separator, instead of pressures in the flare line.

The District Court permitted counsel for respondent, as a part of their argument, to file the exhibit which appears at pages 174 to 176 of the transcript of the record. In that document, the erroneous assumptions of petitioner's counsel were pointed out; and as there demonstrated to the Court, the claims of petitioner's counsel about the amount of the gas which had escaped at the casinghead and been flared, were wild, extravagant, absurd, and utterly ridiculous. As stated in that document, based on the evidence in the record,

> "that in any event the amount involved in this lawsuit concerning gas is less than $300, as against the plaintiff's claim of $112,000."

Yet, by this petition for certiorari filed herein, plaintiff's counsel still talks about a value of $112,000 for the gas that was burned; when, as a matter of fact, it would not amount to as much as $300, if there had been any market for it, which there was not, and even if it could have been processed and any value could have been thereby created for it.

Petitioner's counsel argues in his petition that regardless of the fact there was no market for the gas, it could

have been put back in the ground. Petitioner's argument and theory in that regard wholly ignores the positive and uncontradicted evidence at pages 163-164 of the transcript of the record on that very question, where it was proven if this casinghead gas in its raw state had been put back in the leasehold, through an in-put well,

> "With the offset wells to the Chapman and Shereshovech leases producing as they were producing, and they produced wide open, to put repressured gas back in the reservoir of either or both of those leases, would have forced a large amount of oil from under the Chapman and Shereshovech across the boundary line, to be captured by offsetting and adjoining wells."

In other words, the use of casinghead gas for repressuring would have operated to reduce the amount of oil recovered from the leases in question, and resulted in direct loss and damage to the petitioner.

The rights of the parties in interest in this case, petitioner and respondent, are fixed and determined by the terms of the oil and gas leases (Tr. of Rec. pp. 7-15), under which petitioner owns 1/32nd royalty interests. The other three fractional royalty interests are owned by various individuals not parties to this suit, and the 28/32nds working interest is owned by respondent. Therefore, the interest of the respondent to recover and save any value from the casinghead gas was twenty-seven times as great as that of the petitioner. For every dollar that petitioner might realize from the recovery and saving of either oil or gas, respondent would recover and realize $27.00. That fact explains why respondent did everything that was humanly possible to so operate the leases in question as to produce the largest possible

realization. The positive and undisputed evidence shows that the leases were so operated by respondent as to produce and save the highest possible amount of oil and gas under the surface of the land described in the leases.

Numerous oil wells had been drilled on lands immediately adjoining the two leases in which petitioner had his 1/32nd royalty interest, and those wells were being operated to capacity. It therefore became and was necessary for respondent to drill offset wells on the leases in question (known as the Shereshovech and Chapman leases), and to operate these offset wells in the same manner that wells were being operated on adjoining lands; otherwise, oil and gas underlying the Shereshovech and Chapman leases would have been drained to the wells drilled and operated on adjoining tracts.

The really valuable property right in this oil field was in the recovery of oil from the underlying oil-bearing strata. There were no wells "where gas only was found." This oil field was what is commonly known as a "gas expansion field"; that is, there was gas intermingled with the oil in the producing strata; it was impossible to produce the oil without gas escaping at the casinghead of the well; such gas is known and defined as "casinghead gas"; its principal use and value was as a propelling agency for the production of oil from the wells; it came to the casinghead intermixed with the oil, was carried to separators where the gas was separated from the oil, and passed to flares required to be operated by the laws of the State of Illinois to prevent explosions and disasters in the oil field.

This casinghead gas is what is commonly called "wet gas"; that is, it contains varying amounts of heavy hydrocarbons, very inflammable and highly explosive, and Illinois state law very properly required that it be flared

and not allowed to escape in its raw state into the atmosphere. This casinghead gas had no value in its raw state; but in the evolution of the art, means had been found by the construction and operation of very expensive processing plants to pipe the casinghead gas to such plants and there extract from it protane, butane, gasoline, and other hydro-carbons. The residue, after extracting the heavy hydro-carbons, was fit for commercial use, provided a market be found for it.

After the oil field in southern Illinois was discovered and oil wells were drilled on the leases here involved, only one of two methods or policies could be followed, until a processing plant could be constructed and put into operation, *viz.:*

(a) to close down the oil wells and stop production therein, and thereby allow the oil to be drained from the lease to oil wells on adjoining lands; or

(b) to separate the casinghead gas from the oil and burn the casinghead gas in flares in obedience to state law, until a processing plant could be constructed and put into operation to which the casinghead gas could be piped from the producing wells in the field for processing.

The uncontradicted proof is that with the utmost diligence and within the shortest possible time, respondent built a processing plant and gathering lines, at a cost of approximately two and a half million dollars, and thereafter processed the casinghead gas from the two leases in question and from other leases in the field, and thus created some value for it; and until which time it was flared and burned in obedience to state law.

Petitioner bases his whole claim in this case on an alleged right to recover for 1/32nd part of the casinghead gas that escaped from the wells on the leases in which

he had a 1/32nd royalty interest before the respondent's processing plant was built and put in operation, and which, during that brief period, was necessarily flared in order to keep the oil wells in operation; yet he admits that the raw casinghead gas that was so flared during that brief period was unfit for commercial use, and there was no market for it.

Petitioner entirely ignores the only provision of the leases under which any liability could possibly arise against the respondent to pay for casinghead gas, *viz.*, "Paragraph numbered 3rd" of the covenants of the lessee, respondent herein, which reads as follows:

> "3rd. To pay lessor for any gas produced from any oil well *and used off the premises or in the manufacture of gasoline or any other product* a royalty of one-eighth (1/8) of the market value at the mouth of the well payable monthly at the prevailing market rate" (Tr. of Rec., p. 8).

And petitioner admits that respondent paid him for his *pro rata* share of all the casinghead gas that was gathered from the leases in which he held 1/32nd royalty interests, and which was processed and any value whatever created for it

Not only does the petition for certiorari in this case incorrecty and erroneously assume facts flatly contradictory to the facts established by the evidence in the case, but petitioner also asserts legal propositions wholly at variance with the principles and rules of law established and applied in decisions of the courts below. Petitioner's counsel repeatedly cites the decision of this Court in the case of

Ohio Oil Company v. *Indiana*, 177 U. S. 190,

as authority for various legal propositions advanced by him. He ignores the fact that the *Ohio Oil* case involved

solely the question of the validity of the statute of the State of Indiana, which was attacked on constitutional grounds, but which the Court held was not unconstitutional. The decision of this Court in the *Ohio Oil* case has absolutely no application to the situation or the facts involved in the case here sought to be reviewed.

The petitioner assumes that under the law, he was the owner of the gas which escaped at the casinghead of the well and was flared for a time, and that was subsequently processed. The law in Illinois is exactly to the contrary.

BRIEF AND PROPOSITIONS OF LAW.

The propositions of law advanced by the petitioner, so far as they relate to the issues involved in this case, are in direct conflict with the settled law as pronounced and laid down by the decisions of the Illinois state courts.

I.

Petitioner's assumption that he was the owner of any gas that was flared is entirely erroneous.

The casinghead gas escaping from the oil wells drilled on the leases in question did not belong to the plaintiff, appellant; he had no title whatever thereto; it was the sole property of the lessee, appellee. It was so expressly held by the Circuit Court of Appeals in a former appeal from a judgment on the pleadings.

Watford Oil & Gas Co. v. *Shipman,* 233 Ill. 9;

Union Oil Co. v. *Mutual Oil Co.,* 65 Pac. 2d 896; op. 899;

Western Oil and Refining Co. v. *Venago Oil Corp.,* 24 Pac. 2d 971, op. 973;

Guth v. *Texas Co.,* 115 Fed. 2d 563, op. 566, par. (5).

Par. "3rd" of the Chapman and Shereshovech leases involved herein (Tr. 8 and 12).

II.

Oil and gas in place, by reason of their fugacious character, belong to the owner of the land only so long as they remain under the land; if the owner makes a grant of

them by lease to another, it is a grant only of the oil and gas the grantee (lessee) may take from the land, and the title vests in the grantee to the oil and gas that is actually recovered.

Triger v. *Carter Oil Co.*, 372 Ill. 182; op. 185, and cases there cited.

III.

It is immaterial whether the grant of the right to explore for and recover oil and gas is by deed or by lease; in either case, the title to the oil or gas actually recovered passes to the grantee or lessee as the case may be.

Jilek v. *C. W. & F. Coal Co.*, 382 Ill. 241, op. 246, *et seq.;*

Gray-Mellon Oil Co. v. *Fairchild* (Ky.), 292 S. W. 743;

Ill. Rev. Stat. (1945), Chap. 94, Sec. 6, which reads as follows:

"Any mining right, or the right to dig for or obtain iron, lead, copper, coal, or other minerals from land, may be conveyed by *deed or lease,* which may be acknowledged and recorded in the same manner and with the effect as deeds and leases of real estate."

IV.

The laws of Illinois require that all gas produced from oil wells that is not utilized shall be burned at a safe distance from the well.

Rule D-14, entitled Surplus Gas Disposal, promulgated by the Department of Mines and Minerals, Division of Oil and Gas Conservation, under authority of the provisions of Sec. 67, Chap. 104, Ill. Rev. Stat. (1945), which reads as follows:

> "Rule D-14. Surplus Gas Disposal. All gas produced from operations of oil wells that is not utilized shall be burned at a safe distance from any well, storage tank, building, or inflammable materials, as may be determined by the Department."

Under the provisions of the Criminal Code of the State of Illinois, it is unlawful to keep, store, transport, sell or use crude petroleum, gasoline or other volatile combustibles in such manner or under such circumstances as will jeopardize life or property.

Ill. Rev. Stat. (1945), Chap. 38, Criminal Code, Sec. 351.

Under the State Fire Marshal Act of the State of Illinois, the lessee was prohibited from retaining on the leased premises inflammable and explosive casinghead gas escaping from producing oil wells.

Ill. Rev. Stat. (1945), Chap. 127½, Sec. 9.

V.

Gas escaping from an oil well in a gas expansion field, in the production of the oil, is known as "wet gas" or "casinghead gas". It is without value and there is no market for it, except to a processing plant built and operated to extract from it the heavy hydro-carbons, gasoline, butane, etc. Being unfit and dangerous for use in its raw state, it is of an entirely different character than gas produced from a well where only gas is found and produced; it was not within nor covered by the "2nd" clause of the oil and gas leases involved in this case; but only by the "3rd" clause of said leases, which contains all of the covenants of the lessee with respect to "gas produced from any oil well", that is, "casing-head gas" or "wet gas".

Hein v. *Shell Oil Co.*, 315 Ill. App. 297;

Tucker v. *Carter Oil Co.*, 315 Ill. App. 264;

Ludey v. *Pure Oil Co.*, 11 Pac. 2d 102.

VI.

Casinghead gas, which is gas produced from an oil well in a gas expansion reservoir, is neither oil nor gas within the provisions of Paragraphs "1st" or "2nd" of the oil and gas leases involved in this case.

Hammett Oil Co. v. *Gypsy Oil Co.*, 218 Pac. 501;

Broswood Oil Co. v. *Sand Springs Home*, 62 Pac. 2d 1004.

VII.

There is no fiduciary or trust relationship created between the lessor and the lessee by an oil and gas lease.

O'Donnell v. *Snowden & McSweeney Co.*, 318 Ill. 374, op. 378;

Hein v. *Shell Oil Co.*, 315 Ill. App. 297, op. 300;

Colgan v. *Forest Oil Co.*, 45 Atl. (Pa.) 119, op. 120;

Cooper v. *Ohio Oil Co.*, 25 Fed. Supp. 304, op. 309.

VIII.

"A contract between parties dealing in oil and gas is subject to the same rules of interpretation as any other contract."

O'Donnell v. *Snowden & McSweeney Co.*, 318 Ill. 374, op. 379;

Hammett Oil Co. v. *Gypsy Oil Co.*, 218 Pac. 501.

IX.

It is the settled law in Illinois that the lessor and lessee in an oil and gas lease are *not* tenants in common, each with the other.

Watford Oil & Gas Co. v. *Shipman,* 233 Ill. 9;
Conover v. *Parker,* 305 Ill. 292;
Triger v. *Carter Oil Co.,* 372 Ill. 182;
Jilek v. *C. W. & F. Coal Co.,* 382 Ill. 241.

X.

It was absolutely necessary for respondent to drill wells offsetting wells drilled and put into production on lands adjoining the leases in question, in order to prevent the oil under the leases in which petitioner was interested being drained by the wells on adjoining tracts.

> "Because of the fluidity of oil and gas, and the likelihood of their being withdrawn from the demised land by the operation of wells on adjoining lands, the courts uniformly hold that, in the absence of an express covenant in the lease creating a duty in the lessee to drill wells offsetting those on adjoining lands from which oil and gas are produced in paying quantities, the law implies such a duty."

Summers Oil & Gas, Permanent Edition, Vol 2, Sec. 399, p. 338;

Annotation in 19 A. L. R. 437; also

Annotation in 60 A. L. R. 259;

Powers v. *Bridgeport Oil Co.,* 238 Ill. 397;

Union Gas and Oil Co. v. *Diles,* 254 S. W. 205;

Allegheny Oil Co. v. *Snyder,* 106 Fed. (C. C. A. 6th) 764.

SUMMARY AND CONCLUSION.

The findings of fact made by the District Court are fully supported by the evidence in the case. There was no evidence upon which any other conclusion as to the facts could be reached. The conclusions of law made by the District Court were sound and correct, and fully supported by the decisions of the Supreme Court of the State of Illinois.

The District Court's findings of fact, conclusions of law, and judgment were affirmed by the decision of the Circuit Court of Appeals, and there is no basis upon which any contrary conclusion could be reached by further review of the cause.

We therefore respectfully submit that the petition for certiorari filed herein should be denied.

Respectfully submitted,

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